Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142

COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby comments on the Order and Notice of Proposed Rulemaking (the "NPRM") adopted in the above-referenced proceeding.[1]

DISCUSSION

Since its entry into the international telecommunications marketplace, PanAmSat consistently has supported the development of free, fair, and open competition. The recently-concluded World Trade Organization ("WTO") Basic Telecom Agreement creates new opportunities for such competition and, as a result, reduces the need for the Commission to impose strict entry restrictions on foreign-affiliated carriers from WTO member countries. PanAmSat therefore concurs with the Commission's conclusions regarding the benefits of an open-entry policy for these foreign-affiliated carriers and supports the Commission's proposal to adopt such a policy.[2]

As the Commission has recognized, however, an open entry policy will promote the growth of effective competition in the U.S. domestic and international telecommunications services markets only if it is tempered by an appropriate set of regulatory safeguards. Such safeguards are necessary to prevent a foreign-affiliated carrier from leveraging the market power of its foreign carrier affiliate to the detriment of unaffiliated U.S. carriers, competition, and consumers.[3] The risk of discrimination — and, hence, the need for regulatory safeguards — is greatest when a

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1 By their terms, the proposals set forth in the NPRM apply only to foreign-affiliated carriers and, thus, should not apply to Comsat, whether or not they are adopted.

2 As the NPRM recognizes, applications by U.S. users to access non-U.S. satellites raise distinct issues from those presented in this proceeding and, therefore, the development of policies to govern the Commission's review of these applications should continue to be addressed separately in the Commission's DISCO II proceeding. NPRM ¶ 61.

3 NPRM ¶¶ 8, 80.

U.S. carrier is affiliated, through equity arrangements or otherwise, with a foreign carrier that has market power in a destination country and that is not subject to effective competition in that country.

Thus, in recognition of the need to promote the development of competition and to sustain it where is has taken hold, PanAmSat urges the Commission to retain and supplement its dominant carrier regulations in the manner discussed below.

I. The Commission Should Retain Its Tariff Filing And Circuit Reporting Requirements.

In the NPRM, the Commission recognizes that, "even in this new competitive environment, [it] must maintain safeguards against the potential for a foreign-affiliated U.S. carrier to leverage the market power of its foreign carrier affiliate to the detriment of unaffiliated U.S. carriers."[4] The Commission, however, proposes to dilute or eliminate two of the Commission's core regulatory safeguards: meaningful tariff review and circuit reporting requirements.

A. The Commission Should Retain A Meaningful Tariff Filing Requirement For Dominant Carriers.

In the NPRM, the Commission proposes to allow carriers regulated as dominant because of a foreign carrier affiliation to file tariffs on one day's notice (rather than fourteen) and to create a rebuttable presumption that such tariff changes are lawful. PanAmSat opposes these proposals.

Tariffs are more than mere formalities. As the Supreme Court has emphasized, the filed rate requirement is "utterly central" to the regulation of common carriers.[5] "[W]ithout the [filed rate requirement] ... it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, ... and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates."[6]

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4 NPRM ¶ 80.

5 Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 132 (1990) (rejecting the Interstate Commerce Commission's deregulatory interpretation of the rate-filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762, upon which the Communications Act was modeled) (quoting Regular Common Carrier v. United States, 793 F.2d 376, 379 (1986)).

6 Id.

The Commission's proposal to allow dominant carriers to file tariffs on one day's notice without cost support runs contrary to the fundamental purposes of the tariff filing requirement. Review of dominant firms' pricing decisions is one of the basic tools the Commission can use to prevent anti-competitive conduct, but this tool is most effective when the public and interested parties can participate in the tariff review process. Tariffs filed on one day's notice allow neither the public nor interested parties an opportunity to comment upon those tariffs, nor do they afford the Commission a realistic opportunity to enforce the requirement that the carrier's rates be just, reasonable, and non-discriminatory.[7] Similarly, because pricing information is largely in the hands of the carrier, a presumption of legality makes the burden of rebutting the presumption virtually impossible to sustain. Thus, the Commission's proposal would render meaningless the substantive tariff filing requirement.

The proposed changes to the Commission's tariff filing rules also will not provide the benefits cited in the NPRM (*i.e.*, they will not reduce regulatory burdens, prevent price coordination, or discourage frivolous challenges). Whether a tariff goes into effect one or fourteen days after it is filed has no meaningful impact on the effort required to file and maintain the tariff. Moreover, as long as rates are tariffed, carriers committed to engaging in tacit price coordination have the means to do so — a shorter notice period will have, at best, a marginal effect.

Finally, a fourteen day filing period does not "encourage competitors to challenge a carrier's rates in order to impede the carrier's ability to compete."[8] The Commission can act expeditiously if it believes competition could be impeded. In fact, most tariff challenges are resolved quickly, on the basis of a public notice, and the Commission never issues a decision. The costs of prosecuting a complaint, moreover, are at least as great as those of defending a rate, and a complaining carrier exposes itself to sanctions if it files a baseless complaint. In any event, the benefits of having the public participate in the tariff review process far outweigh any interest, however tangential, in discouraging frivolous pleadings. Thus, while a shorter tariff filing period would substantially undermine the Commission's ability to assess the

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[7] See Sprint/DT/FT, 11 FCC Rcd 1850, 1868 (1996); Foreign Carrier Entry Order, 11 FCC Rcd 3873, 3975-76 (1995).

[8] NPRM ¶ 92.

lawfulness of a tariff prior to the date on which it becomes effective, its benefits would be marginal or non-existent.

B. The Commission Should Retain Its Existing Rules Governing The Addition Or Discontinuation Of Circuits.

PanAmSat also objects to the proposal to eliminate the requirement that foreign-affiliated dominant carriers from WTO member countries obtain prior Commission approval before adding or discontinuing circuits on those routes for which the carrier is regulated as dominant.

The FCC should not abandon the Section 214 approval process, which serves as an important tool permitting the Commission to monitor and detect, on a timely basis, deviations in traffic flows that might be the result of anti-competitive conduct by the dominant foreign affiliates of U.S. carriers. Quarterly and annual reports are less timely and, by definition, permit only after-the-fact, remedial action by the Commission. For these reasons, until robust facilities-based competition has developed in the international telecommunications services markets, it would be premature for the Commission to eliminate the requirement for prior Section 214 approvals.

II. The Commission Should Adopt Its Proposed Supplemental Dominant Carrier Regulations.

PanAmSat supports the Commission's tentative decision to scrutinize closely U.S. carriers that are affiliated (including those that are affiliated through non-equity arrangements) with foreign carriers that have market power in destination countries that have not issued licenses for the competitive provisioning of facilities-based international services. The danger of leveraging from a carrier that has bottleneck control in an overseas market is too great to allow such a carrier's U.S. affiliate to compete without tight regulation of that relationship.

In particular, PanAmSat supports the proposed prohibitions on exclusive arrangements with an affiliated foreign carrier, including arrangements for joint marketing of basic telecommunications services, customer steering, or the use of customer information.

III. The Commission Should Adopt Its Proposed Structural Separation Requirements.

The NPRM seeks comment on whether there should be some level of structural separation between a U.S. carrier treated as dominant because of its affiliation with a foreign carrier and that affiliated foreign carrier. PanAmSat supports this proposal. As PanAmSat has noted on several occasions, the best, and sometimes only, way to protect against discrimination and cross-subsidization when an entity has market power in some markets, but not others, is through structural separation. This is particularly true when a carrier controls bottleneck facilities in one market that are essential to its competitors' efforts to compete in other markets.

For this reason, for example, both Congress and the Commission have concluded that the risks of the Bell Operating Companies' entry into the in-region long distance market are too great to permit such services to be provided by the BOCs on an integrated basis.[9] These same concerns should motivate the Commission to adopt structural separation requirements mirroring those governing the BOCs' provision of in-region interexchange services for carriers that are regulated as dominant due to their affiliation with a foreign carrier.

IV. The Commission Should Regulate Foreign-Affiliated Carriers In The Same Manner, Whether The Affiliation Arises From An Equity Or A Non-Equity Relationship.

PanAmSat supports the Commission's proposal to continue its current regulatory treatment of non-equity business arrangements between U.S. and foreign carriers. Thus, the Commission should impose basic and, where applicable, supplemental dominant carrier regulation on foreign-affiliated U.S. carriers on any route where a co-marketing or other arrangement presents a substantial risk to competition in the U.S. international services markets.

The Commission previously has recognized that non-equity relationships may create the same incentives for discrimination and other anti-competitive behavior as do equity relationships. Nothing in the WTO Basic Telecom Agreement changes this fact and, as a result, there is no reason for the Commission to abandon its scrutiny and

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[9] See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 272; Non-Accounting Safeguards, CC Docket No. 96-149 (rel. June 24, 1997).

regulation of non-equity affiliations. In particular, PanAmSat urges the Commission to impose each of the basic and supplemental dominant carrier regulations discussed herein to all foreign affiliated carriers, whether the affiliation arises from an equity or a non-equity relationship. In addition, "no special concessions" rules should apply to any carrier with a non-equity relationship with a dominant foreign carrier.

V. The Commission Should Not Adopt The Proposed Benchmark Settlement Rates Condition.

Finally, PanAmSat opposes the Commission's proposal to prohibit U.S. facilities-based private line carriers from originating or terminating U.S. switched traffic over their facilities-based private lines until all U.S. carriers' settlement rates for the country or location at the foreign end of the private line are within the benchmark settlement rate range to be established by the FCC. Rather than promote competition, the proposed limitation would give undue power to the former monopoly carrier in the destination country. In essence, it would permit that carrier to dictate when U.S. facilities-based private line carriers could provide switched services. Moreover, the proposed rule could stifle competition by preventing U.S. carriers from entering into carriage arrangements with competitive carriers overseas at below benchmark rates if the former monopoly carrier in the country still maintained its rates above benchmark levels. The rapid introduction of global telecommunications competition would not be served by such a restriction.

CONCLUSION

For the foregoing reasons, PanAmSat supports the Commission's proposal to adopt an open-entry policy for foreign-affiliated carriers from WTO member countries. PanAmSat, however, urges the Commission to combine this policy with an appropriate set of regulatory safeguards and to apply these safeguards to dominant foreign-affiliated carriers linked by non-equity, as well as equity, relationships.

Respectfully submitted,

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